IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 440 of 2005

to

TAX APPEAL NO.442 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA

HONOURABLE MS.JUSTICE H.N.DEVANI

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

==========

JAYANTILAL SATYADEV PATEL - Appellant(s)

Versus

INCOME TAX OFFICER - Opponent(s)

==========

Appearance :

MRS SWATI SOPARKAR for Appellant(s) : 1,

MR BB NAIK for Opponent(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 21/12/2005

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. The assessee-appellant has proposed the following six identically worded questions in all the three appeals.

"(i)Whether, in the facts and circumstances of the case the ITAT was right in law in holding that the appellant has made unexplained investments in the residential flat purchased by his wife ?

1. Whether, in the facts and circumstances of the case the ITAT was right in law in not appreciating that the appellant was having sufficient agricultural income to justify the investment made in the residential flat ?
2. Whether, in the facts and circumstances of the case the ITAT was right in law in holding that conversion of protective assessment in to substantive assessment does not amount to enhancement of income ?
3. Whether, in the facts and circumstances of the case the ITAT was right in law in holding that issuing a notice of enhancement of assessment is not mandatory under law ?
4. Whether, in the facts and circumstances of the case the ITAT was right in confirming such enhancement of income without issuance of notice which is not permissible under the law ?
5. Whether, in the facts and circumstances of the case the ITAT was right in law in not considering and adjudication on the alternate contention raised by the Appellant before them ?

1. After hearing Mr. S.N.Soparkar, the learned Senior advocate on behalf of the appellant on 14th November, 2005, the Court had issued notice for final disposal only in relation to proposed question No.6. Thereafter, the matter was heard at length on 8th December, 2005 and the learned advocate for the appellant was permitted to tender additional affidavit in support of the alternative contention raised by the appellant before the Tribunal. Accordingly the appellant has tendered additional affidavit dated 17th December, 2005

and the matter was heard at length, but due to paucity of time no orders could be made yesterday i.e. 20th December, 2005. The facts for all the three appeals are identical and hence the facts for assessment year 1992-93 may be stated in brief.

2. For assessment year 1992-93 the relevant accounting period is 31st March, 1992. It appears that a search took place under Section 132 of the Income Tax Act, 1961 (the Act) at the residential premises of one Shri Manhar. N. Kakadia on 19th January, 1994. The search revealed that the assessee had invested a sum of Rs.1,75,000/= for booking flat No.101 at Deepa Complex, Adajan Road, Surat. Thereupon summons under Section 131 of the Act was issued and served on the assessee and his statement was recorded on 2nd February, 1994. In the said statement the assessee accepted that the flat in question was booked by him and investment amounting to Rs.1,75,000/= had been made by him. The Assessing Officer has taken note of further averments made in the statement recorded on 2nd February, 1994. One of the averments pertains to another property situated at 14, Neelkanth Society, Bhatar Road, Surat, acquisition whereof was explained by the assessee as being investment made by his father from agricultural income. The assessee also accepted that flat No.102 in Deepa Complex had been booked by his wife Smt. Geetaben. J. Patel.
3. On 7th February, 1994, one more statement was recorded pursuant to summons issued under Section 131 of the Act wherein the assessee flatly denied having booked any property in Deepa Complex, either in his name or name of his family member. However in response to question Nos.14 and 15 it was stated by the assessee that the flat was booked in his name by his uncle Shri Narottambhai Patel, residing at U.S.A.
4. Thereafter, notices under Section 148 of the Act were issued and assessments for the three years reopened. In response to notice under Section 143 (2) of the Act the assessee put forth a version that flat No.101 had been booked by the assessee out of agricultural income, and in support he produced extracts of village form No.7/12, 8-A etc. as well as some receipts showing sale of sugar-cane.
5. The Assessing Officer did not accept the explanation so tendered and came to the conclusion that though the

assessee might have agricultural income it was not sufficient to invest the amount for booking the flat, subsequent statement dated 7th February, 1994 could not be accepted, and ultimately on the basis of appraisal report proposed that the investment made in names of six different persons, including the assessee, had to be taxed in the hands of Shri Manhar. N. Kakadia. The Assessing Officer further took note of the fact that Shri Manhar N. Kakadia, was approaching the Settlement Commission by filing an appropriate application, and considering the fact that the assessment was getting barred by limitation the investment made by six persons would be added in the hands of Shri Manhar.N. Kakadia on substantive basis. However as a protective measure to safeguard the interest of revenue, the assessee was protectively assessed. It was found by the Assessing Officer that out of total amount of Rs.1,75,000/=, a sum of Rs.75,000/= was liable to be taxed in assessment year 1992-93, Rs.25,000/= in the assessment year 1993-94, and remaining Rs.75,000/= in assessment year 1994-95.

6. The assessee carried the matter in appeal before Commissioner (Appeals). After hearing the Chartered Accountant of the assessee, the Commissioner (Appeals) came to the conclusion that flat No.101 of Deepa Complex belonged to the assessee and had to be substantively assessed in his hands. That there was no basis to come to the finding that the flat should be assessed substantively in the name of the builder. In relation to the explanation of the assessee that the source of investment was agricultural income, it was held by the Commissioner (Appeals) that even if there was any agricultural income, the same would be forming part of investment made in the property being 14, Nilkanth Society. That the assessee had also booked flat No.102 in the name of his wife. Therefore, agricultural income would also have been used for making investment in the name of wife. The Commissioner (Appeals) therefore concluded that the source of investment in flat No.101 was not proved.
7. The assessee filed Second Appeal before the Tribunal. Vide impugned order dated 1st September, 2003, the Tribunal came to the conclusion that it was not inclined to interfere with the findings of the Commissioner (Appeals) who had

given cogent reasons for sustaining the addition in question for all the three years. The Tribunal also upheld that “other grounds of appeal are of general nature which need no adjudication and hence the same are dismissed.”

8. The assessee moved an application for rectification of the order of the Tribunal under Section 254 (2) of the Act on the ground that the Tribunal while disposing of the appeal has not disposed of ground No.3 which reads : “The appellant submits that such an action amounts to enhancement and since no notice was given, the order is required to be cancelled.” has not been disposed of while disposing of the appeal.

9. After hearing both the sides vide order dated 28th July, 2004, the Tribunal rejected the Miscellaneous Application holding that conversion of a protective assessment into a substantive assessment did not amount to enhancement of income,and therefore there was no necessity for issuing any notice. The Tribunal also held that when it had stated in paragraph No.4 that other grounds of appeal which are of general nature need no adjudication and hence the same were dismissed would mean that even ground No.3 had been dealt with by the Tribunal and dismissed.

10. In the aforesaid backdrop of facts and circumstances of the case the appellant has proposed the aforesaid six questions. However considering the fact that all the authorities have concurrently recorded findings of fact after appreciating the evidence on record, the Court had issued notice only in relation to proposed question No.6. It was submitted by the learned advocate that the alternative contention to show that the builder has been substantively taxed, and as a consequence, the assessee could not be taxed, was required to be dealt with by the Tribunal and the Tribunal had failed to carry out the said exercise. Therefore, after hearing the learned counsel the Court had directed the appellant to file additional affidavit to place on record, so as to satisfy the Court prima facie, as regards the evidence which would go to show that the builder had been actually taxed in relation to the disputed property.

11. The additional affidavit dated 17th December, 2005, reads as under.

“1. I am the Appellant herein and aware of the facts giving rise to the controversy. I am, therefore, competent and authorized to file this affidavit.

2. I say that this additional affidavit is being filed by me for the purpose of placing on record the evidence, which shows that the alleged property was never allotted to me and I was never given the possession of the said alleged.

3. It is most respectfully submitted that the flat no.101 of Vimal Villa Service Society, A-1, situated in Deepa Co-operative Housing Society, Surat (the “alleged property” for short) is in the name of one Shri Maheshkumar Himmatlal Shah. A letter dated 20th July 2003 is attached herewith and annexed hereto as **Annexure “A”** to this affidavit.

4. It is most respectfully submitted that the alleged property was earlier in name of Manubhai Desai from 1993 to 2003 and from 2003 onwards it is in the name of one Shri Mahesh H. Shah as stated in para 3 above. A letter dated 17-12-2005 is attached herewith and annexed hereto as **Annexure “B”**to this affidavit.

5. I further submit that I have to no objection if the Hon'ble Court observes that the alleged property be vested to any third party.

Solemnly affirmed at Surat on 17th day of December 2005.”

1. On going through the said affidavit it is apparent that what is stated in paragraph No.2 is bald averment without supporting evidence. Even when one reads the affidavit in its entirety, it is not possible to hold that the assessee was never the owner of the property, or that the assessee was never in possession of the property, or that the builder had been taxed qua the self-same property.
2. In these circumstances, in absence of any evidence to prima facie support alternative contention, it is not possible to hold that the Tribunal has committed any error which would give rise to a substantial question of law. The prayer, therefore, that the matter may be restored to the file of the Tribunal, requires to be rejected.
3. In absence of any infirmity in the impugned order of Tribunal so as to give rise to a substantial question of law, the appeals are dismissed.
4. The Registry is directed to place a copy of this order in all connected matters.

(D.A.MEHTA, J.)

(HARSHA DEVANI,J.)

*mithabhai